

Letter of Findings Number: 04-20130347
Sales and Use Tax
For Tax Years 2010-2011

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.

ISSUES

I. Sales Tax—Imposition.

Authority: IC § 6-2.5-1-1; IC § 6-2.5-1-5; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-7; IC § 6-2.5-4-1; IC § 6-2.5-9-3; IC § 6-8.1-5-1; [45 IAC 2.2-3-4](#).

Taxpayer protests the assessment of sales tax on certain sales.

II. Use Tax—Imposition.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-8.1-5-1; [45 IAC 2.2-3-4](#).

Taxpayer protests the assessment of use tax on certain purchases.

STATEMENT OF FACTS

Taxpayer is an Indiana business in the printing industry. As the result of an audit, the Indiana Department of Revenue ("Department") determined that during the tax years 2010 and 2011 Taxpayer had not collected and remitted sales tax on some sales which were subject to sales tax and had also not paid sales tax on some of its purchases which were subject to sales tax. The Department therefore issued proposed assessments for sales tax, use tax, and interest for those years. Taxpayer protests a portion of those assessments. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Sales Tax—Imposition.

DISCUSSION

Taxpayer protests a portion of the Department's imposition of sales tax for the tax years 2010-11. The Department based its determination that sales and use taxes were due on a review of Taxpayer's records. Taxpayer argues that a portion of the sales in question were not subject to sales tax for several reasons. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

Sales tax is imposed by IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
 - (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.
- (Emphasis added).

Use tax is imposed under IC § 6-2.5-3-2(a), which states:

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

[45 IAC 2.2-3-4](#) further explains:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Therefore, when a taxpayer is acting as a retail merchant it is responsible for collecting and remitting sales tax on the transactions it has with its customers. On the other hand, when a taxpayer purchases tangible personal property ("TPP") for its own use and that TPP is used, stored, or consumed in Indiana, that taxpayer owes use tax unless sales tax was paid at the time of the transaction.

Taxpayer protests the proposed assessments on several grounds. The first point of protest is that the Department considered that Taxpayer had not collected and remitted sales tax on amounts for postage included in Taxpayer's delivery costs. The Department also refers to IC § 6-2.5-4-1, which states in relevant part:

- (a) A person is a retail merchant making a retail transaction when he engages in selling at retail.
- (b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:
 - (1) acquires tangible personal property for the purpose of resale; and
 - (2) transfers that property to another person for consideration.
- (c) For purposes of determining what constitutes selling at retail, it does not matter whether:
 - (1) the property is transferred in the same form as when it was acquired;
 - (2) the property is transferred alone or in conjunction with other property or services; or

(3) the property is transferred conditionally or otherwise.

....

Next, IC § 6-2.5-9-3 provides:

An individual who:

(1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and

(2) has a duty to remit state gross retail or use taxes (as described in [IC 6-2.5-3-2](#)) to the department; holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state. If the individual knowingly fails to collect or remit those taxes to the state, he commits a Class D felony.

(Emphasis added).

Therefore, when a retail merchant makes a retail sale, that merchant is required to collect and remit the sales tax on that transaction to the state.

In this case, the Department reviewed Taxpayer's sales and determined that Taxpayer had not collected and remitted sales tax on the amounts it received from its customers regarding postage. The Department imposed sales tax on Taxpayer as a retail merchant. The first relevant statute is IC § 6-2.5-1-1, which states:

(a) Except as provided in subsection (b), "unitary transaction" includes all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated.

(b) "Unitary transaction" as it applies to the furnishing of public utility commodities or services means the public utility commodities and services which are invoiced in a single bill or statement for payment by the consumer.

(Emphasis added).

Also of relevance is IC § 6-2.5-1-5(a), which, during the years at issue, provided:

Except as provided in subsection (b), "gross retail income" means the total amount of consideration, including cash, credit, property, and services, for which tangible personal property is sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for:

(1) the seller's cost of the property sold;

(2) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller;

(3) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges;

(4) delivery charges; or

(5) consideration received by the seller from a third party if:

(A) the seller actually receives consideration from a party other than the purchaser and the consideration is directly related to a price reduction or discount on the sale;

(B) the seller has an obligation to pass the price reduction or discount through to the purchaser;

(C) the amount of the consideration attributable to the sale is fixed and determinable by the seller at the time of the sale of the item to the purchaser; and

(D) the price reduction or discount is identified as a third party price reduction or discount on the invoice received by the purchaser or on a coupon, certificate, or other documentation presented by the purchaser.

For purposes of subdivision (4), delivery charges are charges by the seller for preparation and delivery of the property to a location designated by the purchaser of property, including but not limited to transportation, shipping, postage, handling, crating, and packing.

(Emphasis added).

The Department reviewed Taxpayer's records and determined that Taxpayer was charging its customers postage as part of its delivery charges, but had not been charging sales tax on those amounts, as required by IC § 6-2.5-1-5(a). The Department therefore issued proposed assessments for sales tax which Taxpayer should have charged as a retail merchant under IC § 6-2.5-2-1(b).

In the course of the protest process, Taxpayer provided documentation and analysis in support of its position that it did not charge postage costs to its customers as part of its delivery charges. After review of this material, the Department agrees that Taxpayer was not charging postage to some of its customers as part of its delivery costs and therefore was not required to collect sales tax on those amounts. The documentation supplied by Taxpayer is grouped into categories listed by customer name (initialed "WCA" and "MC") for two customers and one group titled "Other Customers." The Department will remove postage charges from the amounts subject to sales tax and will recalculate the amount of sales tax which should have been charged by Taxpayer. Taxpayer has met the burden imposed by IC § 6-8.1-5-1(c).

Next, Taxpayer provided exemption certificates for several of its customers. The Department refers to IC § 6-2.5-3-7, which states:

(a) A person who acquires tangible personal property from a retail merchant for delivery in Indiana is

presumed to have acquired the property for storage, use, or consumption in Indiana, unless the person or the retail merchant can produce evidence to rebut that presumption.

(b) A retail merchant is not required to produce evidence of nontaxability under subsection (a) if the retail merchant receives from the person who acquired the property an exemption certificate which certifies, in the form prescribed by the department, that the acquisition is exempt from the use tax.

(Emphasis added).

Therefore, a retail merchant is not required to collect and remit sales tax on sales to resellers if the retail merchant receives exemption certificates from their customers, as provided by IC § 6-2.5-3-7. Since Taxpayer provided exemption certificates for some of its customers, sales to those customers will be removed from the Department's calculations of sales tax due from Taxpayer as a retail merchant. Taxpayer has met the burden imposed by IC § 6-8.1-5-1(c). For any sales which Taxpayer claims were to customers who purchased TPP for resale, but for which Taxpayer has not provided exemption certificates, Taxpayer has not met the burden imposed by IC § 6-8.1-5-1(c).

Taxpayer's next point of protest involves sales to out-of-state customers. As provided by IC § 6-2.5-2-1(a), sales tax is imposed on transactions made in Indiana. Therefore, if Taxpayer's customers took possession of the TPP in another state, those are non-taxable out-of-state transactions. However, if an out-of-state customer took possession of the TPP in Indiana, then the transaction took place in Indiana and is subject to Indiana sales tax. After a review of the documentation supplied with the protest, the Department is unable to verify where Taxpayer's customers took possession of the TPP. Taxpayer has not met the burden imposed by IC § 6-8.1-5-1(c).

Next, Taxpayer protests that the Department listed several sales in its calculations of sales subject to sales tax upon which sales tax was collected at the time of the sale. After review of the documentation supplied in the protest process, the Department is unable to verify that this is the case. Taxpayer has not met the burden imposed by IC § 6-8.1-5-1(c).

In conclusion, Taxpayer is sustained regarding the imposition of sales tax on postage charges to its customers listed under the categories "MC", "WCA", and "Other Customers." All postage charges to other customers were properly included as taxable amounts as provided by IC § 6-2.5-1-5(a) during the audit years. Taxpayer is sustained regarding sales to customers for whom it has provided exemption certificates. Taxpayer is denied regarding sales to customers whom Taxpayer claims made the purchases for resale but for whom Taxpayer was unable to provide exemption certificates. Taxpayer is denied regarding sales to out-of-state customers, since Taxpayer was unable to verify where those customers took possession of the TPP. Taxpayer is denied regarding sales upon which it states sales tax was collected at the time of the transaction. A supplemental audit will recalculate sales tax due for the years at issue after removing the amounts for postage to "MC", "WCA", and "Other Customers" and the amounts from sales to customers for whom exemption certificates have been provided.

FINDING

Taxpayer is sustained in part and denied in part, as explained above.

II. Use Tax—Imposition.

DISCUSSION

Taxpayer protests the imposition of use tax on some purchases it made during the tax years 2010 and 2011. The Department based its determination that use tax was due on some of Taxpayer's purchases on a review of the documentation available at the time of the audit. Taxpayer protests that it paid sales tax at the time of purchase for some of the transactions. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

Sales tax is imposed by IC § 6-2.5-2-1, which states:

(a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.

(b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

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Use tax is imposed under IC § 6-2.5-3-2(a), which states:

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

[45 IAC 2.2-3-4](#) further explains:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Therefore, when a taxpayer purchases tangible personal property ("TPP") for its own use and that TPP is used, stored, or consumed in Indiana, that taxpayer owes use tax unless sales tax was paid at the time of the transaction.

In the instant case, the Department determined that Taxpayer had not paid sales tax on some items of TPP at the time of purchase. The Department therefore imposed use tax on those purchases. In the course of the protest process, Taxpayer provided documentation in support of its position that some of its purchases were not subject to Indiana use tax. The reasons listed along with the documentation include: 1) purchases upon which sales tax was paid at the time of purchase; 2) one check was voided and was not a purchase; 3) the TPP in some transactions were purchased by Taxpayer for resale and were therefore exempt; 4) the transactions in question were for services and labor only.

After review, the Department agrees that some of the items at issue should be removed from the calculations of purchases subject to use tax. The Department will conduct a supplemental audit to remove any purchases which, by review of the available documentation, can be verified as exempt from use tax. For instance, if an invoice shows that sales tax was paid at the time of purchase, then use tax is not due. However, if an invoice shows a purchase of TPP but does not show that the TPP was resold; such an invoice does not prove that the purchase was exempt. The audit division will use its discretion in determining which invoices establish that use tax is not due.

FINDING

Taxpayer's protest is sustained to the extent it is verified via a supplemental audit.

SUMMARY

Taxpayer is partially sustained in Issue I regarding the imposition of sales tax which Taxpayer should have collected and remitted as a retail merchant. Taxpayer is sustained regarding the imposition of sales tax on postage charges to its customers listed under the categories "MC", "WCA", and "Other Customers." Taxpayer is also sustained regarding sales to customers for whom exemption certificates have been provided. Taxpayer is denied in all other aspects regarding Issue I. Taxpayer is sustained subject to verification via supplemental audit in Issue II.

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